

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

NINTENDO OF AMERICA INC.,

Plaintiff,

v.

DOES 1-20, d/b/a, ANXCHIP.COM,
AXIOGAME.COM, FLASHCARDA.COM,
MOD3DSCARDS.COM, NX-CARD.COM,
SXFLASHCARD.COM, TXSWITCH.COM,
and USACHIPSS.COM,

Defendants.

No. 2:20-cv-00738-TSZ

PLAINTIFF'S RESPONSE TO
MINUTE ORDER REGARDING
DEFAULT JUDGMENT

Plaintiff Nintendo of America Inc. (“Nintendo”) submits this supplemental brief in response to the Court’s Minute Order of September 24, 2020, and in further support of Plaintiff’s Motion for Default Judgment and Permanent Injunction. Pl.’s Mot. for Default Judgment, Dkt. 25. In the Minute Order, the Court asks whether it can enter “partial default judgment” without voluntary dismissal of claims against Defendant Does 1–20. As clarified herein, Defendant Does 1–20 (the “Doe Defendants” or “Defendants”) are the defendants in this matter—the websites are merely the d/b/a-s through which the Doe Defendants engage in the unlawful conduct set forth in the Complaint. *See* Complaint, Dkt. 1, ¶ 3; *supra*, case caption. Plaintiff seeks default judgment and a permanent injunction against all Doe Defendants, and thus there are no defendants that need to be voluntarily dismissed.¹

By way of background, on May 15, 2020, Nintendo initiated this litigation against Does 1–20, the owners and operators of eight websites who use their websites to sell devices that unlawfully hack the Nintendo Switch in violation of the Anti-Trafficking provisions of the Digital Millennium Copyright Act, 17 U.S.C. §§ 1201(a)(2) & 1201(b)(1). Some of the defendants also sell pirated versions of Nintendo’s copyrighted games on their websites, in violation of Nintendo’s exclusive rights under the Copyright Act, 17 U.S.C. §§ 106, 501, & 503. *See* Compl., Dkt. 1 ¶¶ 2–5, 12–13, 25–36, 39–40.

Because Defendants have taken steps to hide their real-world identities, Nintendo does not know the identity of the specific individuals who operate the websites and thus sued them as Does 1–20, doing business as the various websites they operate.² *See, e.g.*, Complaint, Dkt. 1, ¶¶

¹ Plaintiff’s motion for entry of default and the accompanying proposed order requested entry of default against “all Defendants.” Dkt. 22. The Clerk’s entry of default lists the d/b/a websites, but not the Defendants themselves. Dkt. 24. Nintendo respectfully suggests that this may have caused confusion. To the extent the Court is concerned that, because the entry lists the websites, default has not been formally entered against the Doe Defendants, Nintendo respectfully requests that the Court direct the Clerk to modify the Order of Default, Dkt. 24, so that it is entered against “Doe Defendants d/b/a” the websites. *See* Fed. R. Civ. P. 55(a). In moving for entry of default, Plaintiff submitted a proposed order, and so the Court or clerk could rely on that order. *See* Dkt. 22-1, [Proposed] Entry of Default.

² The particular number of Doe defendants is simply meant to capture the individuals who collectively operate the Websites, but Nintendo does not know how many actual individuals operate any one of them.

38–39 (“Defendants Does 1–20 operate the Websites through which they offer to the public, sell, and otherwise traffic in the Circumvention Devices Nintendo has been unable to ascertain the true identities of any of the Defendants.”). In other words, Nintendo has sued the unknown owners and operators of the websites—the Doe Defendants—to stop the illegal acts the Doe Defendants are committing *through* the websites.

Because the Doe Defendants continued to conceal their identity following the initiation of this suit, Nintendo moved to serve Defendants Does 1–20 by alternative means via electronic mail. *See* Pl.’s Mot. for Leave to Serve Process by Alternative Means, Dkt. 15 (“Mot. for Alternative Service”). This Court granted the motion, and Nintendo served the Doe Defendants on July 16, 2020. Decl. of Alison Stein, Dkt. 21. Even though the Doe Defendants have made clear their awareness of the suit—for instance, by quickly “domain hopping,” *i.e.* moving their website from one URL to another in order to evade detection,³ and by sending communications to their customers explicitly referencing this lawsuit, *see* Mot. for Alternative Service, Dkt. 15 at 14–16—the Doe Defendants failed to appear, let alone respond. In light of this failure, Nintendo moved the Clerk to enter default “against all Defendants.” Mot. for Entry of Default, Dkt. 22. The Clerk entered default on August 19.⁴ Dkt. 24.

On September 4, 2020, Nintendo moved this Court for a default judgment and permanent injunction against “Defendants Does 1–20, d/b/a” the websites. Pl.’s Mot. for Default Judgment, Dkt. 25, at 2. The Court can now enter Default Judgment and a Permanent Injunction against the Doe Defendants. *See, e.g., Arista Records, LLC v. Tkach*, No. 15–CV–3701 (AJN), Dkt. 94, *Default Judgment and Permanent Injunction Order* (S.D.N.Y. Dec. 11, 2015) (granting default judgment and a permanent injunction against “Does 1–10, d/b/a” two different websites); *Sapient*

³ Specifically, ANXCHIP.COM became LOWBR.COM, FLASHCARDA.COM became MATERPL.COM, MOD3DSCARDS.COM became BRUJOON.COM, and NXCARD.COM became AGRESU.COM. Decl. of Alison Stein, Dkt. 25-1, ¶ 4. As Nintendo noted first in its Motion for Leave to Serve Process by Alternative Means, Dkt. 15 at 2 n.2, and again in its subsequent papers, *e.g.* Dkt. 25 n.1, reference to Defendants’ websites should be read to encompass both the original URLs and any and all new URLs.

⁴ *See supra* note 1.

1 *Corp. v. Okorie*, No. 18 CIV. 1681, 2019 WL 1983230, at *3 (N.D. Cal. Mar. 26, 2019)
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 3 (entering default “against Does 2-50” who operated online accounts and profiles and granting
 4 motion for default judgment); *Deckers Outdoor Corp. v. Does 1-55*, No. 11 C 10, 2011 WL
 5 4929036, at *6 (N.D. Ill. Oct. 14, 2011) (granting default judgment against “Does 1–55 d/b/a”
 6 aliases which registered websites); *cf. Fernandez-Peralta v. Gamez*, No.
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 8 CV1903749CJCMRWX, 2019 WL 9240983, at *3 (C.D. Cal. Nov. 7, 2019) (denying default
 9 judgment against unnamed Defendants only because those defendants “ha[d] not been served”).
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 13 Once this order is entered against the Doe Defendants, Nintendo may enforce the
 14 injunction against the websites the Doe Defendants operate, including by sending the default
 15 judgment and permanent injunction to the registrars hosting the websites, who will then be
 16 compelled to shut down the websites per Federal Rule of Civil Procedure 65(d) and as set forth
 17 in the proposed order. *See* Dkt. 25-2, Proposed Final Judgment and Permanent Injunction, ¶ 2
 18 (“The Court further enjoins . . . all third parties acting in active concert and participation with
 19 Defendants—including but not limited to any domain name registrars or registries holding or
 20 listing any of Defendants’ websites—from supporting or facilitating access to any or all domain
 21 names . . . through which Defendants traffic in circumvention devices”); *see also, e.g.,*
 22 *Tkach*, No. 15–CV–3701 (AJN), Dkt. 94, *Default Judgment and Permanent Injunction Order*, at
 23 6 (S.D.N.Y. Dec. 11, 2015) (enjoining third parties including “domain name registrars or
 24 registries holding or listing any of the” infringing websites); *Arista Records, LLC v. Tkach*, 122
 25 F. Supp. 3d 32, 39 (S.D.N.Y. 2015) (holding that injunctions against individuals operating
 26 websites may be enforced against third party internet service providers); *DISH Network, L.L.C.*
 27 *v. Dima Furniture Inc.*, No. CV TDC-17-3817, 2019 WL 2498224, at *8 (D. Md. June 17, 2019),
 28 *report and recommendation adopted*, No. CV TDC-17-3817, 2019 WL 5588901 (D. Md. July
 29 12, 2019) (granting default judgment and holding that nonparty internet service providers would
 30 be bound by an injunction).
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1 For the reasons set forth in Nintendo's Motion for Default Judgment and Permanent
2 Injunction, Nintendo respectfully requests that this Court grant default judgment and enter a
3 permanent injunction against Defendants. *See* Dkt. 25-2.
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1 DATED this 30th day of September, 2020.

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3 Respectfully submitted,

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5 **GORDON TILDEN THOMAS &**
6 **CORDELL LLP**

7 Attorneys for Plaintiff Nintendo of America Inc.

8
9 s/ Michael Rosenberger

10 Michael Rosenberger, WSBA #17730
11 Michael Brown, WSBA #45618
12 600 University Street, Suite 2915
13 Seattle, WA 98101
14 Telephone: 206.467.6477
15 mrosenberger@gordontilden.com
16 mbrown@gordontilden.com
17

Respectfully submitted,

JENNER & BLOCK LLP

Attorneys for Plaintiff Nintendo of America Inc.

s/ Alison I. Stein

Alison I. Stein (*Pro Hac Vice*)
Cayman C. Mitchell (*Pro Hac Vice*)*
919 Third Avenue, 38th Floor
New York, NY 10022
Telephone: 212.891.1600
astein@jenner.com
cmitchell@jenner.com

Christopher S. Lindsay (*Pro Hac Vice*)
633 West 5th Street, Suite 3600
Los Angeles, CA 90071
Telephone: 213.239.5100
clindsay@jenner.com

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*Admitted only in Massachusetts, not admitted
in New York. Practicing under the supervision
of the partnership of Jenner & Block, LLP